

Lastly, but not least, a tenant would be able to "squeeze" any sub-tenant of his if he, unlike the head landlord, need not obtain the permission of the Rent Assessment Board before ejecting his sub-tenant.

The case of *Ramasamy Chettiar v. Teung Tze Meng*⁽³⁾ has been brought to my notice in which the learned Judge said:—

It has been argued on behalf of the landlord that "his" means that there must be an immediate relation of landlord and tenant and that the relation between the landlord and the sub-tenant of his tenant cannot be described as "his". I do not think the word "his" has any technical meaning and I do not suppose that the draftsman intended to introduce a technicality.

In view of my decision on this reference that the word "landlord" in the Enactment must mean the immediate landlord of a person, I am unable to agree with the learned Judge in that case that the word "his"

has no technical meaning. Since I have ruled that there must be immediate relationship of landlord and tenant and that such a relationship does exist between a tenant and his sub-tenant, the reason why the draftsman used the word "his" in section 7 becomes apparent.

Accordingly on the reference I rule:—

- (a) That the word "landlord" in the Rent and Charged Land (Restriction) Enactment, 1940, includes a tenant where such tenant has rightfully sub-let; and
- (b) That such tenant must obtain the permission of the Rent Assessment Board before he can take any step to eject his sub-tenant.

Reference answered accordingly.

KEDAH REPORT.

TAN CHOOI SIAK vs. ABDULLAH BIN HAJI DRASHID.

[App. Civil Jurisdiction (McElwaine, C.J., S.S., Aitken, Ag. J.A. and Carey, J.) September 13, 1941]

Kedah Courts Enactment, Section 11—Evidence Ordinance (S.S.) Sections 91, 92 and 93—Parol evidence to vary terms of written document—Conditional sale of land—Where no time fixed in agreement for repurchase, it must be done within a reasonable time.

By an agreement in writing made between them the defendant sold conditionally to the plaintiff two pieces of rubber estate (which he had earlier bought from the plaintiff) for \$1,000/-. It was further agreed that so long as the defendant did not repurchase the land, the output of rubber and the coupons were to be transferred to the plaintiff as his own property. The agreement contained a clause:—

"No heirs or agents of mine (i.e. the defendants) shall prohibit or forbid Towkay Tan Chooi Siak from this date onwards for the period of ten years. If Abdullah is unable to repay the sum of \$1,000/- to Towkay Tan Chooi Siak, I Abdullah agree to come down to execute a bond transferring absolutely the said rubber land to Towkay Tan Chooi Siak without any further question or answer."

It appeared that the transaction between the parties was as follows:—The defendant purchased the two pieces of land from the plaintiff for \$2,000/-. He gave a charge to the plaintiff for \$1,000/- on an entirely different piece of land. The charge could not be registered and so the parties prepared and signed the document under consideration.

The plaintiff sued for specific performance of the agreement. The making of the agreement was admitted but the defendant gave evidence that before the ten years had expired he offered to pay but the plaintiff refused to accept the money till the ten years had expired. The defendant further gave evidence that when the period of ten years had expired he again offered to settle but the plaintiff refused.

Before the Court of Appeal, the main point argued was that as the plaintiff was suing for specific performance, the defendant was entitled to give parol evidence to show that the document did not set out the real agreement. No decision on this point was however given by the Court of Appeal, and the case was decided on a narrower point.

Held, that as the agreement sued on fixed no time for repurchase, the repurchase must be effected within a reasonable time and as the money was in fact tendered within a reasonable time after the expiration of the ten years' enjoyment of the profits of the land, the defendant-respondent was entitled to the return of the lands on payment of the agreed repurchase price.

Cases referred to:—

- (1) *Haji Osman v. Ng Ah Siew* 8 M.L.J. 247.
- (2) *Price v. Ley* 32 L.J. Ch. 530.
- (3) *Woolam v. Hearn* 7 Ves. 211.
- (4) *In re Duke of Marlborough, Davis v. Whitehead* (1894) 2 Ch. 133.
- (5) *Lincoln v. Wright* 4 De G. & J. 16.
- (6) *Haigh v. Kaye* L.R. 7 Ch. App. 469.
- (7) *Clarke v. Grant* 14 Ves. 519.
- (8) *Joynes v. Statham Note to Townshend v. Stangroom* 6 Ves. 335.

- (9) *United States of America v. Motor Trucks Ltd.* (1924) A.C. 200.
- (10) *Shipley U.D.C. v. Bradford Corporation* (1936) Ch. 397.
- (11) *R. v. Willans* 3 Kyshe 16.
- (12) *N. S. Narainan Pillay v. Nederlandsche Handel Maatschappij* 3 M.L.J. 227.
- (13) *Pethaperumal Chetty v. Munimandi Servai* 24 L.T.R. 462.
- (14) *Mackenzie v. Coulson* L.R. Eq. 375.
- (15) *Balkishen Das v Legge* 27 Ind. App. 58.
- (16) *Somasundram Chetty v. Lim Han Kai* (1927) S.S.L.R. 64.
- (17) *Rebello v. Harbans Singh* 1933-4 F.M.S. L.R. 96; (1933) M.L.J. 279.
- (18) *Raman Chettiar v. Sarkies* (1929) S.S.L.R. 128.
- (19) *Peterson v. S.S. "Ban Ho Liong"* (1940) S.S.L.R. 220; (1940) M.L.J. 259.

APPEAL TO THE COURT OF APPEAL OF KEDAH.

Mr. Balfour E. Ross for appellant.

Mr. R. D. Hume for respondent.

The facts and arguments sufficiently appear from the judgment of McElwaine C.J., S.S. (President).

Cur. Ad. Vult.

McElwaine, C.J., S.S.—The plaintiff Tan Chooi Siak assigned his rights in the subject matter of this litigation to Lim Ong Guan and the latter was by order of a Judge joined as a plaintiff.

By an agreement in writing made on 18th. Rabilawal 1346 the defendant sold conditionally to Tan Chooi Siak two pieces of rubber estate (which he had bought from Tan Chooi Siak) for \$1,000. It was further agreed that so long as the defendant did not repurchase the land, the output of rubber and the coupons were to be transferred to the plaintiff as his own property. The document, which was not drawn up by a lawyer, contained a clause "No heirs or agents of mine (i.e. defendant's) shall prohibit or

forbid Towkay Tan Chooi Siak (the plaintiff) from this date onwards for the period of ten years. If Abdullah (defendant) is unable to repay the sum of \$1,000 to Towkay Tan Chooi Siak, I Abdullah agree to come down to execute a bond transferring absolutely the said rubber land to Towkay Tan Chooi Siak without any further question or answer."

It appears that the transaction was as follows: The defendant purchased these two pieces of land from the plaintiff for \$2,000. He gave a charge to the plaintiff for \$1,000 on an entirely different piece of land. The parties were agreed that a charge on the lands to which the agreement referred could not be registered under the law of Kedah applicable to these particular lands at the date of the agreement, so the document, which was treated on the appeal as being a conditional sale with a right to repurchase within or at the expiration of ten years, was prepared and signed.

The plaintiff sued for specific performance of this agreement of 18th Rabilawal 1346, or "alternatively the payment to the plaintiff of \$2,500 as the lands are now worth \$2,500." This appears to include a sum of \$1,500 alleged in the plaint to have been expended, but of this no evidence was given.

The making of the agreement was admitted, but the defendant gave evidence that before the ten years had expired he offered to pay but the plaintiff refused to accept the money till the ten years had expired. The defendant further gave evidence that when the period of ten years had expired he again offered to settle but the plaintiff refused.

The case for the defendant was that the intention of the parties was that the land should be charged or mortgaged, but as this could not be done the transaction was put through in the form of a conditional sale. Che Laidin bin Haji Abdul Manan, an Assistant Director of Lands, Kedah, gave evidence for the defendant in the course of which he said that Tan Chooi Siak in 1357 petitioned Government for a transfer of the land and on 5.1.1358 Tan Chooi Siak appeared before the witness and made a statement which the witness recorded and which Tan Chooi Siak signed. The witness gave parol evidence of this statement and he produced the actual document recording the statement. In this statement Tan Chooi Siak said, "I sold to Abdullah seven years after I had bought. At first Abdullah wanted to buy this land; he had

no ready money. Then a charge was executed on the Surat Akuan in my favour. But no charge could be executed on the Surat Akuan; therefore an agreement was executed for a conditional sale to him at the price of \$1,000. Now Abdullah is unable to repay my money. I ask that this land be transferred to me. But if Abdullah is able to repay this \$1,000 within the period of one month I am willing to return the land to him. The truth is that I only hold the charge." I think the words "conditional sale to him" should read "conditional sale by him" as stated in Che Laidin's evidence.

Tan Chooi Siak did not give evidence.

The learned Malay Chief Judge of the Second Division was "unable to accept" the agreement. His principal reasons were because the defendant is illiterate and the persons alleged to have attested the agreement as witnesses were not reliable.

As the defendant admitted that he executed the agreement the reliability of the attesting witnesses is only material in considering the weight to be given to their evidence that the illiterate defendant knew the contents of the agreement.

One of these witnesses was the petition writer who drew the agreement. This man knew Tan Chooi Siak but did not know the defendant. He said he read the agreement to the defendant before he took his finger impression on the document.

The other witness was also illiterate and he could not recollect whether he had affixed his finger print to the document and he said he could not recognize the document if he saw it. He did not recollect much about the agreement but he said the defendant was present at the time it was being prepared; he remembered the land mentioned in the agreement and that it was a conditional sale for \$1,000.

As against these two witnesses was the evidence of the defendant which was to the effect that he executed an agreement not in duplicate and that Tan Chooi Siak kept the agreement. In the course of his evidence he said, "In the agreement I admitted that I sold to Tan Chooi Siak my rubber produced from the land (i.e. the land mentioned in the agreement) and the available value of rubber must be used to pay off my debt of \$1,000 to Tan Chooi Siak."

"I remember having fixed my finger impression on the agreement about the sale of rubber to Tan Chooi

Siak. In the agreement I agreed to sell my rubber to him for a period of ten years. Before the expiration of the period of ten years I offered to pay up and settle the \$1,000 but Tan Chooi Siak refused to accept it and said that we should wait till the period of ten years expired. When the period of ten years expired I offered to pay up and settle the \$1,000. Tan Chooi Siak refused to receive it." He also said that after the agreement he remained in possession of the land for six months.

The defendant was not cross-examined. Tan Chooi Siak did not give evidence. The only part of the defendant's evidence that was contradicted or challenged was the part about his not knowing that the document was a conditional sale of the land.

On 5.1.1958 the defendant appeared before the Assistant Director of Lands and said he would repay, and the Assistant Director has sworn that within three weeks the defendant brought \$1,000 to pay to Tan Chooi Siak and that he (the Assistant Director) sent for Tan Chooi Siak to hand over the money to him but he refused to receive it, so he returned the \$1,000 to the defendant.

There was undoubtedly evidence upon which the learned Judge of the Second Division could find that the defendant did not know that the document which he signed was a conditional sale of the land.

The learned Judge ordered that the defendant do pay to the plaintiff \$1,000 and costs and that upon payment of this \$1,000 and costs the plaintiff do return to the defendant the two pieces of land.

From this judgment the plaintiffs appealed to the learned Judge of the First Division.

The principal grounds of appeal were:—

- (1) that the learned Judge of the Second Division was wrong in rejecting the agreement of 18th Rabilawal 1346;
- (2) that oral evidence varying the terms of the said agreement was inadmissible.

On the hearing of the appeal before the learned Judge of the First Division the plaintiff was represented by Counsel, but as the defendant was not represented the Judge had not the advantage of hearing his side of the case argued.

Before the Judge of the First Division it was argued that the defendant's statement that he was on the plantation for six months went to his credibility. But this statement was pleaded and was deposed to in evidence and no attempt was made to contradict it.

It was also argued that the Judge should not have gone outside the agreement and that the introduction of parol evidence contravened section 91 of the Evidence Enactment.

Then it was submitted that the Judge should not have rejected the agreement and that as the \$1,000 was not paid within ten years, in equity Abdullah should retransfer the land to the plaintiff subject to the permission of the State Council.

The learned Judge allowed the appeal.

After referring to the fact that the defendant alleged fraud by Tan Chooi Siak, the learned Judge of the First Division proceeded to criticise the reasons of the learned Chief Judge of the Second Division for rejecting the witnesses to the agreement. If the learned Malay Judge was not satisfied on their testimony that the agreement was executed by the defendant, the criticism of the learned Judge of the First Division is valid. But it was not the execution of the document which was doubted. The Malay Judge was not satisfied that the defendant was aware of, or agreed to, its contents.

The defence filed definitely raised the issue of deception and fraud and the defendant's evidence supported this allegation. Tan Chooi Siak did not go into the witness box. He relied on the petition writer whom he had employed more than ten years previously to draw the agreement, and the illiterate second witness whose evidence was to the effect that the defendant knew the contents of the agreement before he executed it.

There was evidence on which the Court might find that the defendant never agreed to the terms which were written in the document which he executed, though he was unable to read it. I agree that this case can be distinguished on its facts from *Haji Osman v. Ng Ah Siew*⁽¹⁾, but all the same I think that when an illiterate person executes a document without an independent adviser the Court should be satisfied that he knew and understood the contents of the document, especially when the document evidences a rather one-sided contract.

The defendant says that he did not receive the \$1,000, and there is no evidence, apart from the agreement, to contradict him.

There is evidence that, whether the transaction was a conditional sale or not, the \$1,000 was the balance of the purchase price of the land, the other \$1,000 having been secured by a charge on other land belonging to the defendant.

It seems to me that a bargain whereby an illiterate person gives the profits of his land for ten years at the end of which period he will still be liable for the whole of the original debt, should give rise to suspicion when there is nothing to suggest that the profits do not exceed what might be regarded as reasonable interest on the purchase price. There is no evidence that the profits of this little rubber estate of between 11 and 12 relongs (a little over 8 acres) were not amply sufficient over a period of ten years to pay off the \$1,000 with reasonable interest. What those profits were Tan Chooi Siak alone could say and he did not disclose them.

The fact that an agreement is, on the face of it, highly unfavourable to an illiterate party to the agreement, affords some corroboration of the party's evidence that the document was executed by him under the influence of fraud or mistake, and evidence of fraud or mistake can be given under Proviso 1 to section 92 of the Evidence Enactment.

Further, the defendant's evidence that he never intended to sell this land conditionally receives some slight support from Tan Chooi Siak's statement to the Assistant Director of Lands, and the evidence would, if the defendant's case was that he did not know or consent to the terms of the document, be admissible for the purposes of Proviso 1, irrespective of whether it is admissible or not under Proviso 2 of Section 92. Even though there may not have been fraud, if the defendant did not know that he was selling the land, that would be a mistake of which evidence could be given.

The learned Judge of the First Division says: "I examined the defendant at the hearing of the appeal as to his means and that evidence is sufficient to show the falsity of the defendant's allegations as to offers of payment. It is clear that the land which was under charge to plaintiff No. 1 for \$1,000 was "sold by the chargee when six years of the ten year term had elapsed. The defendant therefore clearly had no

means at that time to pay the \$1,000 which was stipulated to be paid under agreement Exhibit B" (i.e. the agreement of 18 Rabilawal 1346).

But if this agreement was valid there was no advantage in paying the \$1,000 before the 10 years expired, because the plaintiff was to have the rubber and coupons for ten years. Whether immediately on the termination of the ten year period the defendant could have raised the money is another matter, but there is very strong uncontradicted evidence that the defendant could pay the \$1,000 on or before 26.1.1358.

When the charged land was sold it may be presumed, in the absence of evidence to the contrary, that a substantial part, if not the whole, of the first \$1,000 was paid out of the proceeds of the execution. But if Salleh bin Saaid's evidence is true, it supports the learned Judge of the First Division to this extent that at about the end of the ten year period the defendant could not pay.

This leads me to a point which was not argued before the Court of Appeal, though I think it is raised in the 5th ground of appeal, "Time was not of the essence of the contract." I see nothing whatever in that agreement to indicate when the \$1,000 must be paid. What is clear is that Tan Chooi Siak was to have the rubber and coupons for ten years without let or hindrance from the heirs or agents of the defendant, so there would be no advantage in paying before the ten years expired, and he should be allowed a reasonable time after that period within which to pay.

Although the points I have considered were raised in the Memorandum of Appeal, the only point argued before us was that as the plaintiff was suing for specific performance, the defendant was entitled to give parol evidence to show that the document did not set out the real agreement. In support of his argument Mr. Balfour Ross referred to section 11 of the Courts Enactment which provides that the Courts of Appeal shall determine appeals in accordance with the principles of law and equity in force for the time being in the Colony of the Straits Settlements.

There is no doubt that the Court can set aside an agreement on the grounds of mistake, fraud or surprise, *Price v. Ley*⁽²⁾; and as I have indicated, there was evidence of mistake, if not of fraud.

Mr. Ross' argument was that apart altogether from fraud or mistake leading up to the making of

the agreement, evidence could be given as to what the parties intended, and he submitted that it was fraudulent to enforce the written agreement for a conditional sale when it was well known that the real agreement was for a charge or to give security and that a defendant resisting specific performance could give evidence of what the real agreement was.

We were referred to *Price v. Ley*⁽²⁾ and *Woolam v. Hearn*⁽³⁾. Both these cases related to mistake in the document itself, and if the appellant when he executed the agreement knew what it contained, neither of these cases assists this part of his case.

More in point is *In re Duke of Marlborough. Davis v. Whitehead*⁽⁴⁾ to which we were also referred. In that case Stirling, J. held that in the case of an absolute assignment from a wife to her husband evidence was admissible to prove that she had assigned the house to her husband solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should re-assign to her. The husband mortgaged the house and the equity of redemption was reserved to him alone. He died before reconveying and the equity of redemption was claimed by creditors of his estate. The Court held that the equity of redemption belonged to the wife.

In *Lincoln v. Wright*⁽⁵⁾ parol evidence that an instrument, which on the face of it was an absolute assignment, was really intended to be in the nature of a mortgage, was admitted. Turner, L.J. said "If the real agreement in this case was that as between the plaintiff and Wright the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the assignment as being absolute and parol evidence must be admitted to prove the fraud."

In *Haigh v. Kaye*⁽⁶⁾ the plaintiff conveyed an estate to the defendant. It was admitted that no purchase money was paid and that it was understood that the defendant should account to the plaintiff for the rents. James, L.J. said "The defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the Statute of Frauds, and claims the estate as a right. Now the Statute of Frauds no doubt says, that a person claiming under any declaration of trust or confidence must show that in writing; but the statute goes on to say that no resulting trust, and no

trust arising from operation of law, is within that enactment. I apprehend it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud."

Clarke v. Grant⁽⁷⁾ was a case in which the plaintiffs sued for specific performance. Evidence was admitted to prove that the defendant only signed the agreement in consequence of the promise of the plaintiffs to consent to such alterations with regard to a piece of land which he was to get as would be for his convenience, so that but for the promise there would probably never have been an agreement at all. "It would be against equity" said Grant M. R. "and a fraud on the defendant to insist upon his performance of an agreement, which he only signed on the faith of an alteration being made in one of its terms. It has been ruled, that it is not open to a plaintiff to supply or correct a term of a written agreement by parol, but it has never been determined, that a defendant cannot set up a parol engagement in opposition to a party, who, having entered into it, seeks to have a written agreement specifically performed independently of it."

In *Joynes v. Statham* (referred to in a note to *Townshend v. Stangroom*⁽⁸⁾) Lord Hardwicke admitted parol evidence on behalf of the defendant, who by that evidence showed that the plaintiff had taken an unfair advantage of the evident ignorance of the defendant. The Earl of Birkenhead, L.C. in tendering the advice of the Judicial Committee in *United States of America v. Motor Trucks Ltd.*⁽⁹⁾ said "It was further suggested that the present action involved an attempt to enforce a parol contract inconsistently with the principle of the Statute of Frauds. It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly that such agreement has been inaccurately represented in the instrument. When this is proved either party

may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement. The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute."

See too *Shipley U. D. C. v. Bradford Corporation*⁽¹⁰⁾.

The cases to which I have referred may not always be easy to reconcile with sections 92 and 93 of the Evidence Enactment which appear to me to accord with English law, but there seems to be no doubt that in suits for specific performance the English Courts of Equity do not follow the rule of law as to the exclusion of oral evidence.

Section 11 of the Courts Ordinance confers on the High Court of the Colony the same jurisdiction and authority within the Colony as was formerly exercised in England by the High Court of Chancery and is now exercised by His Majesty's High Court of Justice.

The Evidence Ordinance was enacted in 1893, the Courts Ordinance in 1934, though the latter Ordinance was based on, and section 11 follows the corresponding section in, the Courts Ordinance, 1907, which replaced a still earlier Ordinance of 1878.

The jurisdiction conferred on the Court of Judicature of Prince of Wales' Island, Singapore and Malacca by the Letters Patent of 10th August 1855 included the jurisdiction exercised in England by the High Court of Chancery.

The Equitable jurisdiction of the Court has probably existed since Courts were established in the Colony. In *R. v. Willans*⁽¹¹⁾, Sir Benson Maxwell, speaking of the Charter of 1807, said "it gives the Court the powers of the Superior Courts of Law and Equity at Westminster, to be exercised as far as circumstances admit, without stating or leaving any room for presuming that it was intended that these powers should be exercised otherwise than in the same manner and under the same rules and principles as they are exercised in England."

The apparent conflict between the Evidence Ordinance and the rules and principles exercised in

Courts of Equity in England fell to be considered in 1915 in *N. S. Narainan Pillay v. Nederlandsche Handel Maatschappij*⁽¹²⁾. Bucknill C.J. expressed the view that since the Court from its inception has been endowed with all the equitable jurisdiction exercised by a Court of Equity in England it does not appear that here the Evidence Ordinance of 1893 can be so construed as to oust the general powers possessed by the Court. Edmonds J. appears to have been of a similar opinion. The section, said this learned Judge "has no application where neither of two ostensible parties had any animus contrahendi." Earlier in his judgment he referred to the Privy Council case of *Pethaperumal Chetty v. Munimandi Servai*⁽¹³⁾. The learned Judge proceeded to consider what is now section 93 of the Evidence Ordinance and, having expressed a view very similar to what was said by James, V.C., in *Mackenzie v. Coulson*⁽¹⁴⁾ said "In order that the section may apply one must have a contract and then its operation prima facie only affects the terms. Read together with its provisoes, in a jurisdiction like this where English Common Law and Equity prevail, I doubt whether it has any more effect than the corresponding rule of the English Law of Evidence enunciated in very similar terms in article 90 of Stephen's Digest of the Law of Evidence."

Then he referred to *Balkishen Das v. Legge*⁽¹⁵⁾ (in which Lord Davey said that the English Chancery cases cited had no application to the law of India) and said "it does not necessarily follow that such cases have no application in this Colony."

Narainan Pillay's case does not appear to have been mentioned (it was not then reported) in the Colony Court of Appeal case *Somasundram Chetty v. Lim Ham Kai*⁽¹⁶⁾ in which Murison C.J., delivering the judgment of the Court, held that evidence admissible in English Courts of Equity could not be admitted if it conflicted with section 93 of the Evidence Ordinance. That decision was followed by the F.M.S. Court of Appeal in *Rebello v. Harbans Singh*⁽¹⁷⁾ in preference to *Raman Chettiar v. Sarkies*⁽¹⁸⁾ in which Murison C.J. said his earlier decision was "not of general authority."

I note that in the report of the F.M.S. case no reference is made to *Narainan Pillay's* case.

In *Peterson v. s.s. "Ban Ho Liong"*⁽¹⁹⁾ I expressed my doubt as to whether the equitable jurisdiction which the Court has under section 11 (1)

of the Courts Ordinance necessarily involves a power to apply rules of evidence applied by English Courts of Equity which are at variance with the Evidence Ordinance, but there is more to be said for the view taken in *Narainan Pillay's* case than I then thought.

This point was not fully argued before us. An appropriate occasion may arise when the Court, after a full argument, may have an opportunity of choosing between the conflicting decisions but it has not now that opportunity.

I therefore propose to rest my decision on the fact, which was apparently not appreciated in either of the Courts below, that the agreement sued on fixes no time for repurchase. That being so, the repurchase must be effected within a reasonable time, and I think the \$1,000 was tendered to the respondent within a reasonable time after the expiration of his ten years' enjoyment of the profits of the land.

As an alternative to specific performance the respondent claimed \$2,500 as damages. He gave no evidence of having suffered any damage, but there is no doubt that the appellant must pay \$1,000 to repurchase the land.

I would therefore allow the appeal with the costs of this appeal and the costs of the appeal to the First Division.

The appellant shall, within two months after the taxation of the costs, pay to the respondent \$1,000 and the costs of the proceedings in the Second Division less the costs allowed by this Court, and upon such payment the respondent shall return to the appellant the two pieces of rubber estate land comprised in Surat Akuan Nos. 402/43 and 403/43 in the Mukim of Ayer Puteh.

Aitken, Ag. J.A.—This case has got into such a tangle that I can see no way out which does not involve something in the nature of a surgical operation.

On most of the points which were argued before us I find myself in substantial agreement with the learned President, but on further consideration of the evidence I have come to the conclusion that there probably was a genuine agreement between the first plaintiff and the defendant which the petition writer strove honestly, and not altogether unsuccessfully, to express in exhibit B. They seem to have carried on quite amicably in accordance with the provisions

contained in that document for the full period of ten years therein mentioned, and no trouble arose between them until the question of the repurchase of the land by the defendant arose.

It seems clear enough that the defendant was not in a position to pay the agreed repurchase price of \$1,000 as soon as the ten years came to an end, but we have the uncontradicted evidence of the Assistant Director of Lands that the defendant actually tendered \$1,000 cash to the first plaintiff a little more than two years later and that the first plaintiff, contrary to what he had told the Assistant Director two or three weeks before, then refused to accept it. I cannot see any good reason why the Assistant Director's evidence on this point should not be accepted *in toto*.

Now exhibit B does not provide that the defendant must pay the \$1,000 necessary to repurchase the land immediately on the termination of the ten year period, and there is no need for us to treat that document as a problem in conveyancing. Since no time limit in regard to the payment of that \$1,000 is laid down therein, it seems to me that payment within

a reasonable time after the completion of the ten year period is all that can be required; and I hold that a period of three years is a reasonable time in all the circumstances of this case.

Upon my view of the evidence the defendant has tendered \$1,000 to the first plaintiff within such a period of three years, and I am therefore of opinion that this appeal should succeed.

I also agree with the learned President that the first plaintiff has failed to establish any claim to damages.

In the result I think that we should restore the judgment of the learned Judge of the Second division of the Kedah High Court, allowing the defendant his costs of the hearing in the first division of that High Court and of this appeal.

Carey, J.—I agree with the conclusion at which the learned President and Aitken J. have arrived and with the order which the learned President proposes.

Order accordingly.

